UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re **STEVEN ALEX DEINES**, and **CATHERINE MARIE DEINES**, Debtors.	Case No. **04-62682-13**
STEVEN ALEX DEINES, and **CATHERINE MARIE DEINES**, Plaintiffs. -vs- **INTERNAL REVENUE SERVICE** and **VICTORIA L. FRANCIS, ASSISTANT U.S. ATTORNEY**, Defendants.	Adv No. **04-00127**

O R D E R

At Butte in said District this 2nd day of March, 2005.

In the Adversary Proceeding, Plaintiffs/Debtors' Request for Jury Trial, docket #4, filed December 29, 2004, and Plaintiffs/Debtors' Notice of Conflict of Interest and Demand for 7th Amendment Common Law Jury Trial, docket # 12, filed January 21, 2005, are presently pending before this Court and are ready for decision. For purposes of rendering a decision on these matters, the Court will issue two decisions. One decision will involve the Plaintiffs/Debtors' Notice of Conflict of Interest that the Court will deem a motion for disqualification. The other

decision will involve the Plaintiffs/Debtors' Request and Demand for Jury Trial.

Plaintiffs filed their chapter 13 bankruptcy case on August 30, 2004. On January 21, 2005, Plaintiffs/Debtors filed a Notice of Conflict of Interest that the Court deems a motion for disqualification. This adversary proceeding constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B), and (O) dealing with matters concerning the administration of the estate, allowance or disallowance of claims against the estate, and other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor relationship and this Court has jurisdiction under 28 U.S.C. § 1334.

Notice of Conflict.

The Court considers the Plaintiffs/Debtors' notice of conflict as a motion for disqualification as it relates to the judge assigned to this Plaintiffs/Debtors' main case and their adversary proceeding. Section 1334 of Title 28, United States Code, provides: "(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11." Subsection (b) provides: "Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). "Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." 28 U.S.C. § 157(a). "Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to

[appellate] review. . . ." 28 U.S.C. § 157(b)(1). "In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court." 28 U.S.C. § 151. The District Court for the District of Montana pursuant to General Order No. 12 (Revised), dated September 26, 1995, has referred "all cases under Title 11, and all proceedings arising under Title 11 or arising in or related to cases under Title 11" to the bankruptcy judges of the District of Montana.

Congress, through the constitutional mandate of Article I, § 8, has the "exclusive power to regulate bankruptcy . . . ." *Gruntz v. County of Los Angeles (In re Gruntz)*, 202 F.3d 1074, 1080 (9th Cir. 2000) *citing Kalb v. Feuerstein*, 308 U.S. 433, 439, 60 S.Ct. 343 (1940). Under 28 U.S.C. § 1334, "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate. *Celotex Corp. v. Edwards*, 514 U.S. 300, 308, 115 S.Ct. 1493 (1995) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir. 1984)." *Gruntz*, 202 F.3d at 1080.

Consequently, if this Court should adopt Plaintiffs/Debtors' position, Plaintiffs/Debtors would have no forum within which to seek bankruptcy relief as all federal judges would be disqualified for the reasons stated by Plaintiffs/Debtors and Plaintiffs/Debtors' bankruptcy case and this adversary proceeding would be dismissed with all creditors having the opportunity to pursue collection of their debts against Plaintiffs/Debtors without the fear of being stopped by the automatic stay imposed automatically under 11 U.S.C. § 362. This Court does not adopt

Plaintiffs/Debtors' argument or position on the issue of disqualification.

Canon 1 of the Code of Conduct for United States Judges requires that a "judge should uphold the integrity and independence of the judiciary." Under Canon 3, a "judge should perform the duties of the office impartially and diligently. The Committee on Codes of Conduct has issued Advisory Opinion No. 78 that concludes that the 'mere status as a . . . taxpayer, is not in itself disqualifying." The outcome in this adversary proceeding has no unique affect on how much tax the judge pays to the taxing entity. Furthermore, the taxing entity has no direct impact on the judge's compensation. Debtors by, citing dicta from *Lord v. Kelley*, 240 F.Supp. 167, 169 (D. Mass. 1965), suggest that the Judge in this proceeding may be intimidated by the Defendant IRS, and thereby not able to render an impartial decision. If such efforts of intimidation should arise by any entity, the judge in this proceeding or in any proceeding before this Court shall report such acts to the appropriate authorities for further prosecution, whether it be civil or criminal.

Section 455 of Title 28 parallels Canon 3C of the Code of Conduct for United States Judges. Section 455(b) enumerates specific disqualifying conflicts of interest. Plaintiffs/Debtors' stated reason for disqualification is not contained within § 455(b). The Court next considers if he may be disqualified under § 455 (a). Subsection (a) states "any . . . judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a).

Section 455(a) imposes an objective standard as to whether a judge's impartiality might be reasonably questioned.

In applying this objective standard, the initial inquiry is whether a reasonable

> factual basis exists for questioning the judge's impartiality. We are limited in this regard to outward manifestations and reasonable inferences drawn therefrom. "In applying § 455(a), the judge's actual state of mind, purity of heart, incorruptibility, or lack of partiality are not the issue." Having stated what § 455(a) is intended to accomplish and the standards for analyzing a recusal motion under that statute, we now note the cautions that must accompany our analysis. The statute "'must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice.'" Neither is the statute intended to bestow veto power over judges or to be used as a judge shopping device. Further, we are mindful that a judge has as strong a duty to sit when there is no legitimate reason to recuse as he does to recuse when the law and facts require.

Nichols v. Alley, 71 F.3d 347, 351 (10th Cir. 1995) (citations omitted). The 10th Circuit Court of Appeals in considering this subsection concluded that the following seven areas ordinarily do not warrant disqualification or recusal:

> (1) Rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters; (2) the mere fact that a judge has previously expressed an opinion on a point of law or has expressed a dedication to upholding the law or a determination to impose severe punishment within the limits of the law upon those found guilty of a particular offense; (3) prior rulings in the proceeding, or another proceeding, solely because they were adverse; (4) mere familiarity with the defendant(s), or the type of charge, or kind of defense presented; (5) baseless personal attacks on or suits against the judge by a party; (6) reporters' personal opinions or characterizations appearing in the media, media notoriety, and reports in the media purporting to be factual, such as quotes attributed to the judge or others, but which are in fact false or materially inaccurate or misleading; and (7) threats or other attempts to intimidate the judge.

Nichols, 71 F.3d at 351 (10th Cir. 1995). In considering the foregoing factors, the judge has just as much obligation not to recuse when no occasion for him to do so exists as when such occasion does exist. *See Hinman v. Rogers*, 831 F.3d 937, 939 (10th Cir. 1987).

> . . . [W]hen considering disqualification, the . . . court is not to use the standard of "Caesar's wife," the standard of mere suspicion. That is because the disqualification decision must reflect not only the need to secure public confidence through proceedings that appear impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby

> potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.

In re Allied-Signal Inc., 891 F.2d 967, 970 (1st Cir. 1989) (citation omitted). In considering disqualification, courts must consider the admonition to reject recusal where the alleged basis for it requires suspicion or speculation beyond what the reasonable person would indulge. Plaintiffs/Debtors' suspicion that compensation from the federal government or intimidation from an IRS employee or other governmental employee is insufficient to satisfy the objective standard and is beyond what a reasonable person would indulge.

Next the Court considers Plaintiffs/Debtors' allegation that Victoria L. Francis, an Assistant U.S. Attorney, somehow should be disqualified because she receives compensation from the federal government derived from the government's power of taxation. Ms. Francis is an employee of the U.S. Attorney's Office in the Department of Justice, an Executive department, which has a statutory obligation and function to represent officers and agencies of the United States sued in an official capacity. 28 U.S.C. §§ 516 to 519. Ms. Francis, based upon Plaintiffs/Debtors' identified basis is not disqualified for a conflict of interest.

Lastly, the Court considers Plaintiffs/Debtors' allegation that Robert G. Drummond, in his capacity of a chapter 13 trustee, should be disqualified. Mr. Drummond receives his compensation from the Plaintiffs/Debtors' plan payments under his appointment as a standing trustee under 28 U.S.C. § 586(e). His compensation is not based upon receipt of monies derived from the government's power of taxation. Mr. Drummond, based upon Plaintiffs/Debtors' identified reason, is not disqualified for a conflict of interest.

IT IS ORDERED that a separate Order will be issued denying Plaintiffs/Debtors' Notice

of Conflict of Interest.

BY THE COURT

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana